

“Murder and the Reasonable Man” Revisited: A Response to Victoria Nourse

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Since the publication of my book *Murder and the Reasonable Man* in June of 2003, many excellent reviews of the book have been written.¹ Victoria Nourse’s book review, which appeared in the Fall 2004 issue of the *Ohio State Journal of Criminal Law*, adds to this outstanding collection.²

I view Nourse’s proposal to upend status³ as a friendly amendment to my switching proposal.⁴ Accordingly, I write only to respond to two questions proposed

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¹ See, e.g., Alafair S. Burke, *Equality, Objectivity, and Neutrality*, 103 MICH. L. REV. 1043 (2005); Andrew E. Taslitz, *Running on Empathy*, CRIM. JUST., Fall 2003, at 58; Caroline Forell, *Homicide and the Unreasonable Man*, 72 GEO. WASH. L. REV. 597 (2004); Book Note, *Murder, He Wrote*, 117 HARV. L. REV. 711 (2003); David Glenn, *Hot-Blooded Killers*, CHRON. HIGHER EDUC., July 25, 2003, at A12; Phil Tajitsu Nash, *Washington Journal: Murder and the Reasonable Man*, ASIAN WK., Nov. 5, 2003, at 11; Bernestine Singley, *Murder and the Reasonable Man: Passion and Fear in the Criminal Courtroom*, WOMEN’S REV. BOOKS, Jan. 2004, at 6.

² Victoria F. Nourse, *Upending Status: A Comment on Switching, Inequality, and the Idea of the Reasonable Person*, 2 OHIO ST. J. CRIM. L. 361 (2004).

³ *Id.* at 363–67. Nourse herself views her proposal as a “friendly suggestion” that “switching” be used as a way to “upend” status norms. *Id.* at 363. Nourse explains that:

“Upending status” (upending the superior/inferior relations likely to distort judgments about the relation between defendant and victim) follows the direction and value of the relationship at issue. In the battered woman self-defense case, an “upending” instruction would say . . . that women should not be penalized for passivity (behavior that differs from that of those on top of the status hierarchy . . .). Similarly, in the white and black defendant self-defense cases, an “upending” instruction would say, in the white defendant case, do not prefer him, do not assume passivity, because he is white (on the top of the status hierarchy) and in the black defendant case, do not penalize him, do not assume aggressivity, because he is black (on the bottom of the status hierarchy).

. . . The theory of an “upending instruction” is that it is about norms as well as characteristics, relations as well as defendants: it says to juries “do not reward defendants for relative social and cultural privilege and do not penalize them for relative social and cultural deprivation.”

Id. at 367.

⁴ In my book, I suggest one possible way to minimize bias in cases involving claims of female infidelity, gay panic, and racialized self-defense would be to have the judge give the jury a race-switching (or gender-switching or sexual orientation-switching) jury instruction. Essentially, the judge would remind jurors that it is wrong to rely on stereotypes based on race, gender, or sexual orientation, but acknowledge the natural tendency of all human beings to categorize and generalize. The judge would tell

by Nourse: (1) Given the problems of bias inherent in the reasonableness requirement, why not simply eliminate it?; and (2) Why not let legislatures modify the doctrine of provocation to disable certain claims of provocation?

I. WHY NOT ELIMINATE THE REASONABLENESS REQUIREMENT?

In Part III of her review, Nourse asks, "Would we really lose so much if we were to eliminate the reasonable person?"⁵ My answer to this question is a resounding yes. To understand why, one need only look at the Model Penal Code's (MPC) approach to provocation, which essentially eliminates the reasonable person. Under the MPC's extreme emotional disturbance defense, the jury is *not* required to find that a reasonable person in the defendant's shoes would have lost his or her self-control and acted in a sudden heat of passion. The jury need only find that the defendant's acts were "committed under the influence of extreme mental or emotional disturbance for which there is a reasonable explanation or excuse."⁶ Although the MPC includes a reasonableness requirement (the defendant's explanation or excuse must be reasonable), the reasonableness requirement in the MPC does not do the work of objectivizing the legal standard as it does under the modern common law approach to provocation, because the jury is explicitly directed to consider the reasonableness of the defendant's explanation or excuse from the defendant's own perspective, not the reasonable person's perspective.⁷

Nourse's important study of provocation cases illustrates the dangers of the MPC's subjective approach to provocation.⁸ In MPC jurisdictions, male defendants who killed wives, girlfriends, ex-wives, ex-girlfriends, and women who rejected them were able to argue extreme emotional disturbance to the jury even when the stimulus for killing consisted of dancing with another man, asking for a divorce, leaving, or simply breaking up.⁹ Similarly situated defendants in early common law jurisdictions would not be able to argue provocation because the early common law limited the types of acts that could be considered legally adequate provocation.

Nourse contends that the modern common law test for provocation, which includes a reasonable person requirement, is just as bad as the MPC approach because

jurors that if they are not sure whether stereotypes are affecting their deliberations, they may switch the races (or genders or sexual orientations) of the defendant and victim. If they come to a different conclusion about the defendant's guilt, then they should deliberate anew, making a conscious effort not to allow race, gender, or sexual orientation bias to influence their deliberations.

⁵ Nourse, *supra* note 2, at 371.

⁶ MODEL PENAL CODE § 210.3(1)(b) (1962).

⁷ The Model Penal Code states, "the reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor's situation under the circumstances as he believes them to be." *Id.*

⁸ Victoria F. Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331 (1997).

⁹ *Id.*; see also *Dixon v. State*, 597 S.W.2d 77 (Ark. 1980); *State v. Martinez*, 591 A.2d 155 (Conn. App. Ct. 1991); *State v. Chicano*, 584 A.2d 425 (Conn. 1990).

it allows male defendants to claim they were provoked by female partner infidelity, a claim which would be foreclosed under the early common law approach unless the defendant was a husband who killed upon catching his wife in the act of adultery. But there is a big difference between being allowed to argue something before a jury and having the jury accept the argument. Nourse's study does not tell us what percentage of male murder defendants in either MPC or modern common law jurisdictions who claimed they were provoked into a heat of passion by a female partner's infidelity were *successful* in mitigating their murder charges to manslaughter.¹⁰ Just because a defendant in a modern common law jurisdiction can argue to the jury that he was reasonably provoked into a heat of passion does not mean the jury will agree with him. Indeed, there is reason to be hopeful that societal attitudes about what constitutes legally adequate provocation change in a good way over time. At one time, being hit on the nose was considered a huge affront meriting a violent response. Today, most persons would say that being hit on the nose is not a legally adequate reason to fly off the handle and respond with deadly force.

Getting rid of the reasonableness requirement in self-defense doctrine would be equally problematic. Without a reasonableness requirement, a defendant could be acquitted on the ground that he honestly believed he was about to be attacked by the victim even if his belief was founded upon completely irrational fears based on the victim's race or ethnicity.¹¹ For example, in *State v. Simon*,¹² an elderly home-owner shot his Chinese-American next-door neighbor, Steffen Wong, as Wong was entering his own home. At trial, the elderly man, Anthony J. Simon, claimed he was afraid of Wong and believed that Wong knew martial arts because of Wong's Asian heritage. The trial judge instructed the jury that "[a] person is justified in the use of force to defend himself against an aggressor's imminent use of unlawful force *to the extent it appears reasonable to him* under the circumstances then existing."¹³ In other words, the judge told the jury to use a subjective standard of reasonableness similar to the standard of reasonableness in the MPC's extreme emotional disturbance defense. Given that the jury was directed to evaluate the reasonableness of Simon's fear from Simon's perspective, it is not surprising that the jury acquitted Simon. Later, the Kansas Supreme Court held that the trial court's instruction to the jury was improper because of its reliance upon a subjective standard of reasonableness, but because of

¹⁰ This is not Nourse's fault. The information necessary to give us such percentages is not readily available. The primary source for legal research is the published appellate court opinion. If a defendant successfully asserts a complete or partial defense, he or she is unlikely to appeal the verdict, and there will be no published record of that defendant's victory (unless the case happens to be written up in the newspapers).

¹¹ Moreover, self-defense doctrine has always allowed individuals to use force when they reasonably, even if mistakenly, believed such force was necessary to protect against an imminent threat. If we eliminated the reasonableness requirement, a self-defender would have to be correct in his belief that the victim posed an imminent threat of bodily harm.

¹² *State v. Simon*, 646 P.2d 1119 (Kan. 1982).

¹³ *Id.* at 1121 (emphasis added).

the double jeopardy prohibition against retrials following an acquittal, Simon's acquittal was not disturbed.

In *People v. Goetz*,¹⁴ the issue was whether the prosecutor erroneously instructed the grand jury on the justification defense of self-defense. Bernhard Goetz was the man who gained notoriety when he shot four young black males on a New York subway in response to a request for five dollars. In a supplemental charge elaborating on the meaning of self-defense, the prosecutor told the grand jurors that they should consider whether Goetz's conduct was that of a "reasonable man in Goetz's situation."¹⁵

Goetz filed a motion to dismiss the indictment, contending that the prosecutor misled jurors by utilizing an objective standard of reasonableness when the statutory test for whether the use of deadly force is justified to protect a person was wholly subjective. The intermediate court of appeals agreed with Goetz, interpreting the phrase "he reasonably believes," which appeared in the New York statute on self-defense, as requiring only that the defendant's beliefs be reasonable to him. The Court of Appeals of New York reversed on the ground that the lower court's standard "would hardly be different from requiring only a genuine belief; in either case, the defendant's own perceptions could completely exonerate him from any criminal liability."¹⁶ The Court explained why a subjective standard of reasonableness was problematic:

We cannot lightly impute to the Legislature an intent to fundamentally alter the principles of justification to allow the perpetrator of a serious crime to go free simply because that person believed his actions were reasonable and necessary to prevent some perceived harm. To completely exonerate such an individual, no matter how aberrational or bizarre his thought patterns, would allow citizens to set their own standards for the permissible use of force. It would also allow a legally competent defendant suffering from delusions to kill or perform acts of violence with impunity, contrary to fundamental principles of justice and criminal law.¹⁷

These cases illustrate why it is important to keep the reasonableness requirement. Without it, a murder defendant who was actually provoked by something relatively minor could claim the provocation mitigation even if his outrage was completely unreasonable. Similarly, a person like Simon, who was actually, but unreasonably, afraid of another person because of that person's race or ethnicity, could claim self-defense and be acquitted.

¹⁴ *People v. Goetz*, 497 N.E.2d 41 (N.Y. 1986).

¹⁵ *Id.* at 46.

¹⁶ *Id.* at 50.

¹⁷ *Id.*

II. WHY NOT LET LEGISLATURES MODIFY THE DOCTRINE OF PROVOCATION TO DISABLE DEFENDANTS FROM MAKING OUTRAGEOUS CLAIMS OF PROVOCATION?

In light of my criticism of gay panic and female infidelity cases, Nourse asks why I do not ask state legislatures to pass legislation which would disable murder defendants from claiming gay panic and/or female partner infidelity as legally adequate provocation? After all, if it is normatively unreasonable for a heterosexual man who kills a gay man to claim he was provoked by a non-violent homosexual advance, then why let him even make the argument to the jury?¹⁸ Similarly, if it is normatively unreasonable for a heterosexual man who kills his female partner to claim he was provoked by her infidelity, why not bar him from making this argument to the jury?¹⁹

I have two responses to this question—one which reflects my view that the jury is a better institutional actor than the legislature when it comes to deciding questions of culpability, and the other which reflects my unwillingness to add to the average criminal defendant's disadvantages in the criminal justice system.

First, I believe juries are better suited than legislatures to the task of making decisions about an individual's culpability. Legislators can only draft broadly stated rules that by necessity will apply to many people regardless of their different circumstances. While they can craft exceptions to the rules they draft, legislators cannot anticipate the myriad of different factual situations that are certain to arise. A regime in which legislatures identify certain types of provocative acts that cannot constitute legally adequate provocation is similar to the early common law approach to provocation in which judges carved out limited categories of acts which were deemed to constitute legally adequate provocation. The regime Nourse seems to favor would simply be the converse of the early common law approach, an approach which was abandoned in large part because of its inflexibility and its inability to account for context.

Juries, in contrast to legislatures, hear only the facts of the case they are deciding. Jurors have to consider the factual context of the case when they decide whether to convict a defendant of murder or manslaughter or find him not guilty of any crime at all. Because of their familiarity with the intimate details of the case and the characteristics of the individual defendant, jurors are better suited than legislators to

¹⁸ Robert Mison argues that allowing defendants to make such arguments to the jury is like giving a judicial stamp of approval to the argument. Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance as Insufficient Provocation*, 80 CAL. L. REV. 133 (1992). Mison therefore would ask judges to rule as a matter of law that a non-violent homosexual advance is not legally adequate provocation. For an opposing view, see Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995).

¹⁹ For example, in 1988, the Maryland state legislature added section 387A (now current section 2-207(b)) to its penal code, which states that the observation of a spouse in the act of adultery does not constitute legally adequate provocation. MD. CODE ANN., CRIM. LAW § 2-207(b) (2002).

determine whether a particular defendant is morally blameworthy, and if so, just how culpable.

Nourse argues that the legislature, as a majoritarian institution, is better able to make the normative call as to which types of provocation should be deemed legally adequate to mitigate a murder charge down to manslaughter. She argues that going from the relatively larger legislature to the relatively smaller jury increases the likelihood of minoritarian bias: "This abstract formula is captured in the simple notion that although it may be easier to obtain a majority in a town than a nation, it is also easier to gather a lynch mob."²⁰ While this analogy may work when comparing the U.S. Congress to state legislatures, it does not hold up when comparing legislatures to juries for the simple reason that juries, for the most part, do not operate on majority rule. In most jurisdictions, criminal juries must render a unanimous verdict. Unanimity forces those in the majority to listen to and consider the views of the minority (because they cannot return a verdict without doing so). In the legislature, in contrast, those in the majority can ignore the views of the minority because they do not need every single legislator's vote to pass legislation. A majority vote is usually sufficient to pass legislation. Moreover, juries are, to a certain extent, majoritarian institutions. Jurors must be picked from a fair cross-section of the community. At least theoretically, the jury represents the community.

My second reason for not advocating legislative action in this area is based on existing inequities in the criminal justice system. As a practical matter, despite the presumption of innocence and the constitutional protections theoretically afforded every criminal defendant, the deck is stacked against most defendants from the moment they enter the courtroom. The jury often believes, consciously or unconsciously, that the defendant is guilty. Why else, a juror might wonder, would the government have pressed charges against him? Judges often make evidentiary rulings and other rulings that give the government an advantage at trial. In short, defendants face numerous obstacles in the criminal courtroom. Disallowing certain claims of provocation would add to these obstacles. Rather than take the question of provocation away from the jury in the first instance, we should simply let the spirited adversarial system work its course. Prosecutors simply need to do a better job of educating jurors whenever there is a risk that race, gender, or sexual orientation bias may affect the way jurors view a case.

III. CONCLUSION

Despite our minor disagreements, Nourse and I both agree that when race, gender, and/or sexual orientation bias affects outcomes in homicide cases, this is a problem that law reformers should attempt to resolve. I hope our combined efforts will encourage others to think about ways to increase fairness in legal decision making.

²⁰ Nourse, *supra* note 2, at 369.